Supreme Court, U.S.
FILED

(1)

99 1 2 1 JUN 1 4 1999

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KATIE R. HARDIN,

Petitioner,

v.

S.C. JOHNSON & SON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIE J. NUNNERY, ESQ.
Attorney for Petitioner
802 West Broadway
Suite 211
Bank One Building
Madison, WI 53713
(608) 224-1900

153094

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

8098

QUESTIONS PRESENTED

In analyzing a claim of unlawful discrimination involving the intersection of both race and gender made by a black female employee, was it improper to compare the black female's treatment only with that of black men and white women?

In evaluating a claim of hostile work environment based on race **and** sex discrimination, are the racial and sexual comments made by an immediate supervisor on and off the workplace premises, even if not directed to or heard by the plaintiff, relevant to the issue of the general pervasiveness of harassment in the workplace?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	3
Evidence Of Andersen's Comments In The Workplace	6
The Proceedings Below	7
The Magistrate Judge's Recommendation	7
The Decision Of The Court Of Appeals For The Seventh Circuit	8
Reasons for Granting the Writ	10
I. The Petition Should Be Granted Because The Opinion Of The Seventh Circuit Court Of Appeals Conflicts With Rulings Of This Court And Other Circuit Courts Of Appeal	

Contents

		Page
	With Regard To Analyzing The Requirements For Determining Whether A Hostile Work Environment Based On Race And Sex Existed	10
II.	The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Vicarious Liability Of An Employer For A Supervisor's Creation Of A Hostile Work Environment	18
	Analyzing The Hostile Work Environment Claim	22
Conclusion		26

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) 19

Burlington Industries v. Ellerth, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 633 (1998) 18, 24, 25, 26

Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982) 16

Dasgupta v. University of Wisconsin Board of Regents, 121 F.3d 1138 (7th Cir. 1997) 21

Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) 22

Faragher v. City of Boca Raton, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 662 (1998) 18, 24, 25

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) 23

Galloway v. General Motors Service Part Operation, 78 F.3d 1164 (7th Cir. 1996) 21

Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) 12

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 25

Cited Authorities

Page

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) 14, 17, 22

Jefferies v. Harris Co. Community Action Ass'n., 615 F.2d 1025 (5th Cir. 1980). 12, 13, 14, 15, 17

Lam v. University of Hawaii, 50 F.3d 1551 (9th Cir. 1994) 15, 16, 17

Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) 23

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 12, 15

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 25

Oncale v. Sundowner Off Shore Services, 523 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 201 (1998) 23, 24

Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969) 14, 17

Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971) 14

Rogers v. Equal Employment Opportunity Comm'n., 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972) 23

Cited Authorities

Page

Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) 11, 17

Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) 12

Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in part, rev'd. in part*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 22

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 2, 7, 8, 9, 21, 24

42 U.S.C. § 1981(a) 3

42 U.S.C. § 1981(b) 3

42 U.S.C. § 2000(e)-(2) 3

42 U.S.C. § 2000e-2(a) 1

§ 703(a) of the Civil Rights Act of 1964 14

Cited Authorities

Page

Rules:

Fed. R. Ev. 402 21

Fed. R. Ev. 403 21

Other Authority:

K. Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics. 1989 *U.Chi. Legal F.* 139 .. 16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated And Decided January 28, 1999 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Eastern District Of Wisconsin Dated And Filed April 1, 1998 ..... 14a

Appendix C — Recommendation To District Judge Of The United States District Court For The Eastern District Of Wisconsin Dated And Filed March 9, 1998 ..... 17a

Appendix D — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated March 15, 1999 ..... 44a

Petitioner, Katie Hardin, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 28, 1999, [Appendix A] The opinion and order of the United States District Court for the Eastern District of Wisconsin was issued on April 1, 1998. [Appendix B] The Recommendation to the United States District Court for the Eastern District of Wisconsin was issued on March 9, 1998. [Appendix C] The order denying the petition for rehearing was issued by the United States Court of Appeals for the Seventh Circuit on March 15, 1999. [Appendix D]

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 28, 1999. [Appendix A] The Court of Appeals denied a timely petition for rehearing on March 15, 1999. [Appendix D]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with regard to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1981 provides:

(a) Statement of Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and Enforce Contracts" Defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of

contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

In 1995, petitioner Katie Hardin filed this action in the United States District Court for the Eastern District of Wisconsin, alleging that she was discriminated against by the conduct of her employer, S.C. Johnson & Son, Inc., and by the acts and conduct of her employer's agent, Nels Andersen. The conduct consisted of harassment because of petitioner's race and gender and it resulted in a hostile work environment. Petitioner's action was brought pursuant to 42 U.S.C. §§ 1981(a) and (b) and Title VII, 42 U.S.C. § 2000(e)-(2).

The petitioner is a black female. She began working for defendant in 1972 as an hourly production worker in its Sturdevant, Wisconsin facility. In 1988, petitioner was transferred to Line 374, an assembly line that produced products packaged in aerosol spray cans.

The Line Chief for Line 374 in 1988 was Nels Andersen. He was responsible for keeping production on schedule, for scheduling vacations and overtime, for monitoring employee break periods and for keeping the machinery operating. Anderson was a very crude person. He used expletives at the workers. He threw tools at the workers and he barraged petitioner with such unsavory statements as "what the hell are you doing?" and "get your head out of your ass." He referred to petitioner as a "dumb motherfucker". In 1989, petitioner and three other female workers initially complained to their supervisor, Ronald

Klimowicz, that Andersen was disrespectful, cursed at them and threw objects at them. Andersen was told that there was no need for profanity in the workplace.

In 1993, respondent reorganized its production operation into a self-directed team operation, in which groups of multi-task teams were organized around the completion of manufacturing tasks. The position of Line Chief was eliminated. The assembly line consisted of 10 males, including two black males, and three black females, including the petitioner. There were no regular full-time white females on line 374. At times, temporary workers from an outside company, including white females, were sent to the line.

Andersen continued cursing at the women and behaving boorishly. He put his hands on petitioner and touched her and "massaged" her shoulders in a manner which petitioner found offensive and intimidating. This was witnessed by other employees, who also heard the petitioner tell Andersen to keep his hands off her. Another black female worker told the supervisor that she felt that Andersen singled her out for abusive treatment because of her gender and race. Expressing concern that Anderson treated women on the line differently, the supervisor again warned Andersen and told him to avoid the petitioner unless he had to speak to her. No formal disciplinary action was taken against Andersen.

Andersen's conduct toward petitioner and the other black women did not stop. Petitioner continued to complain to her supervisor, and when no action was taken against Andersen, she filed a written complaint with Human Resources stating that Andersen was sexually harassing her

and that he did not harass the men, only the women on the line. Andersen received a written warning. Other black females also complained to the supervisor, indicating that they felt that Andersen had a problem dealing with black women. Andersen's harassment continued to be directed at the black women on the line. On shift change-overs, Andersen would demand to know "where the hell are the women at?" and would go look for them. He continued to yell abusively at the black women on the line. He did not yell at white women temporary workers and he did not curse at other men.

In 1995, petitioner again complained to her supervisor and to Human Resources about Andersen's harassment of her, stating that she perceived that she was being treated differently by Andersen because she is a black woman. By this time, petitioner was experiencing mood swings, crying spells and sleep disorders. A member of defendant's diversity committee called William Perez, defendant's president, and told him that petitioner was being stressed out as a result of Andersen's treatment of her. He stated to Perez that if it was a black man doing it to a white female, the black man would be fired. Petitioner herself complained to Mr. Perez, indicating that Andersen was harassing her, that she felt threatened and intimidated, and that she was afraid. Mr. Perez told petitioner that he would check into the matter and advised her to seek the company psychologist.

Andersen's conduct became physically threatening to petitioner. He drove an electric cart up behind her and failed to sound the horn. He slammed the door in her face numerous times. He interfered with her leaving the parking lot by cutting her off in his car. Andersen was eventually transferred to another line.

A. Evidence Of Andersen's Comments In The Workplace

Peggy Brannon is a white female who worked as a temporary employee from an outside company on Line 374 from July, 1991 to December, 1993. She knew Andersen, the petitioner and the black females on the line. From early 1993 until October, 1994, Ms. Brannon dated Andersen, spending time at his apartment and on his boat. While she routinely heard Andersen refer to petitioner and the other black females as "stupid black bitches" and "stupid niggers". When a particular machine on the line broke down, Ms. Brannon heard Andersen directly refer to petitioner as a "stupid black bitch". Based on her observations in the workplace while working on Line 374, Ms. Brannon stated that she and others routinely heard Andersen refer to petitioner as a "stupid black bitch", a "stupid nigger bitch", and a "fucking black bitch". Ms. Brannon indicated that Andersen's comments were common knowledge to all persons working on the line. She indicated that when she worked on Line 374, she never saw Andersen exhibit any vulgarity towards her or other white female workers.

After petitioner filed a complaint about Andersen with Human Resources, Ms. Brannon heard Andersen indicate that "this stupid black bitch" was trying to get him fired. After Ms. Brannon and Andersen moved into an apartment together, she heard Andersen describe petitioner as a "black cunt". Ms. Brannon subsequently severed her relationship with Andersen.

On June 13, 1995, petitioner filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division (ERD), alleging sexual and racial discrimination. On September 8, 1995, she received a right to sue letter, and on September 14, 1995, she brought a cause of action in the United States District Court for the Eastern District of Wisconsin.

THE PROCEEDINGS BELOW

On November 1, 1996, respondent filed a motion for summary judgment, arguing (1) that the alleged misconduct was neither sexual nor racial in nature and was neither severe enough nor pervasive enough to constitute an actionable hostile work environment; (2) that even if Andersen's conduct constituted a hostile work environment based on race and gender, defendant is not liable because it responded reasonably to the petitioner's complaints; and (3) that petitioner's § 1981 claim must fail because Andersen's actions were not racially motivated and petitioner was not subjected to treatment that was not imposed on white employees.

The Magistrate Judge's Recommendation

The magistrate judge first found that under Title VII, petitioner could not allege facts that occurred prior to 300 days before she filed her complaint with ERD. The magistrate judge rejected petitioner's argument that Andersen's conduct was continuous from 1988 to 1995, but indicated that Wisconsin's six-year statute of limitations applies to § 1981 actions, so acts occurring after June 12, 1989 could be brought under that claim.

With respect to petitioner's Title VII hostile environment sexual harassment claim, the magistrate judge rejected the argument that the court must consider what is offensive and hostile to a reasonable woman regardless of whether Andersen treated male and female employees alike. The magistrate judge stated that while Andersen's conduct was reprehensible, it was not taken against petitioner because of her gender and did not constitute actionable sexual harassment. This opinion was based on the acts committed by Andersen within the limitations period:

allowing a door to close in petitioner's face, startling her by approaching her from behind without warning in an electric cart, and cutting her car off in the company parking lot. The magistrate judge found that Andersen was equally disrespectful to men and women, so petitioner could not show that Andersen verbally abused her because she is a woman.

With respect to petitioner's Title VII hostile environment racial harassment claim, the magistrate judge, relying on the same three acts, stated that there was no evidence that these acts were done because of petitioner's race. The magistrate judge noted the affidavit by Ms. Brannon, which indicates that Andersen routinely referred to petitioner as "stupid black bitch", "stupid nigger bitch", "fucking black bitch", and "black cunt", but erroneously stated that these comments were made off the work premises and lack sufficient nexus to establish a hostile work environment.

With respect to petitioner's § 1981 claim for racial discrimination, the magistrate judge stated that blacks and whites were treated with equal disrespect by Andersen, so the petitioner failed to present a *prima facie* case of race discrimination.

The magistrate judge recommended that respondent's motion for summary judgment be granted, and the district court adopted this recommendation.

The Decision Of The Court Of Appeals For The Seventh Circuit

On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court's decision, agreeing with the district court that the continuing violation doctrine was inapplicable, thus eliminating the most damaging evidence

of harassment by Andersen, particularly the racist statements made to Brannon about the petitioner. The Court of Appeals further stated that these statements were made outside the workplace, but noted that "were such noxious statements relevant to the record we considered — if in fact Andersen spoke them in the workplace or to Hardin's face within the limitations period — the thrust of this opinion could be markedly different." [Appendix A, p. 6]

With respect to the petitioner's Title VII claims, the Court of Appeals found nothing inherently racial or sexual about Andersen's language or his acts or that petitioner was singled out for abusive verbal treatment. The Court of Appeals found that Andersen had not made the workplace less congenial for women or blacks than he had for men or whites.

With respect to petitioner's § 1981 claim, the Court of Appeals stated that there was no direct evidence that the defendant acted upon racially discriminatory motives. Moreover, the Court of Appeals stated that the comments in Brannon's affidavit were not time-barred for § 1981 purposes, but again stated that they were not made in the workplace. The Court of Appeals stated that Andersen was not a workplace decision maker, so even if his statements were made in the workplace, they could not provide the basis for a determination of discrimination. The Court of Appeals again, following the same analytical model of proof as for Title VII, stated that petitioner could not point to a similarly situated white employee who was treated more favorably by the defendant, since blacks and whites were treated with equal disrespect by Andersen.

REASONS FOR GRANTING THE WRIT

The analysis used by the Seventh Circuit Court of Appeals conflicts with the analysis used by Courts of Appeals in the Fifth Circuit, Ninth Circuit and Tenth Circuit.

The decision of the Seventh Circuit Court of Appeals conflicts with this Court's prior rulings regarding the vicarious liability of an employer for the creation of a hostile work environment by a supervisor.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL WITH REGARD TO ANALYZING THE REQUIREMENTS FOR DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT BASED ON RACE AND SEX EXISTED

Other than the occasional white temporary worker from an outside company, there were no white females on Line 374. It consisted of black men, white men and black women. The Seventh Circuit Court of Appeals found that the Andersen's conduct was neither sexually nor racially discriminatory because petitioner could not point to a similarly situated white employee who was treated more favorably. Under this analytical model of proof, there was no similarly situated white employee with whom to compare the petitioner, so she was compared to black men and white men.

But this analytical model is in conflict with the analytical model of proof used in the Fifth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the Tenth Circuit of Appeals. This was the very issue in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995), where the plaintiff's supervisor was abusive to both men and women, but the abuse towards the women was of a sexual and gender-specific nature. It included referring to the plaintiff as a "dumb fucking broad", "cunt", and "fucking cunt". The district court granted summary judgment to the defendant, but the Ninth Circuit Court of Appeals held that the district court erred in accepting the argument that the supervisor's treatment of men and women was equally abusive. The Court of Appeals noted that while the supervisor was abusive to men, his abuse of women was different and relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. The Court of Appeals stated that even if the supervisor was abusive to men, a court must consider what is offensive and hostile to a reasonable woman.

Similarly, in the case at bar, Andersen's abuse of black females was different from that of black males and white females. It relied on sexual epithets such as "fucking black bitch". It relied on offensive, explicit references to women's bodies, such as "black cunt". His comments were sexual and gender-specific, and the Court of Appeals should have only considered what is offensive and hostile to a reasonable black woman in the circumstances. Although *Steiner* is a Ninth Circuit case, certiorari was denied by the United States Supreme Court. Instead of following this analytical model of proof, the Seventh Circuit improperly compared a black female to black men and white females.

Furthermore, by using the analytical model that it used, the Seventh Circuit Court of Appeals violated the spirit, if not the letter, of Title VII. This Court has indicated that the language of Title VII, which prohibits an employer from discriminating against an individual because of race, color, religion, sex, or national origin, makes plain the purpose of Congress to assure equal employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

This Court has also stated that the purpose of Title VII is "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). By prohibiting discrimination ***because of race or sex***, Congress intended to prohibit employment discrimination based on any or all impermissible characteristics. *See Jefferies v. Harris Co. Community Action Ass'n.*, 615 F.2d 1025, 1032 (5th Cir. 1980). It is clear that an employer may not treat "some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

Recognition of black females as a distinct protected subclass was made in *Jefferies*, where a black female employee brought a claim for race and sex discrimination when her employer failed to promote her but promoted a black man. The district court dismissed her claims and she appealed,

contending that the court erred in failing to consider her claim of discrimination based on both race and sex. She argued that an employer should not escape from liability for discrimination against black females by showing that it does not discriminate against blacks and it does not discriminate against females. The Fifth Circuit Court of Appeals held that the district court improperly failed to address her claim of discrimination on the basis of both race and sex, stating that discrimination against black women can exist even in the absence of discrimination against black men or white women. 615 F.2d at 1032.

The court in *Jefferies* held that an employer cannot single out black women for discriminatory treatment, stating that it is beyond belief that, while an employer may not discriminate against married women, women with young children, or single pregnant women, an employer could be allowed to discriminate against black women as a class. The court stated that recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. The court stated that

> [i]f both black men and white women are considered to be within the same protected class as black females for purposes of the *McDonnell Douglas* prima facie case and for purposes of proof of pretext after an employer has made the required showing of a legitimate, non-discriminatory reason for the adverse employment action, ***no remedy will exist for discrimination which is directed only toward black females.***

Id. [emphasis added] The court held that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff. *Id.* at 1034. The court stated that the fact that the man who was promoted was black does not bring him within the plaintiff's protected class for purposes of her prima facie case, and held that black males and white females must be treated as persons outside plaintiff's class.

In *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), where the company refused to hire women with preschool-age children while hiring men with such children, the idea that disparate treatment of a sub-class of women could constitute a violation of Title VII was rejected. But the United States Supreme Court held that § 703(a) of the Civil Rights Act of 1964 "requires that persons of like qualifications be given employment opportunity irrespective of sex." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544, 91 S. Ct. 496, 497-8, 27 L. Ed. 2d 613 (1971).

In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), a black female security guard brought an action for racial and sexual harassment against her employer. She was the only black woman on the security force and she alleged that she was subjected to an atmosphere of racial slurs and jokes. Some comments were directed to her personally and some comments were general references to blacks as "niggers" and "coons". The district court rejected her claims, but on appeal, the Tenth Circuit Court of Appeals addressed the issue of whether, in determining the pervasiveness of the harassment against a plaintiff, a trial

court may aggregate evidence of racial hostility with evidence of sexual hostility. Citing *Jefferies*, the court answered the question in the affirmative. Noting that her supervisor had made serious racial slurs against blacks, the court held that the racial and sexual harassment evidence should be combined in determining whether there was a pervasive discriminatory atmosphere, creating a hostile work environment.

In *Lam v. University of Hawaii*, 50 F.3d 1551 (9th Cir. 1994), an Asian female alleged discrimination on the basis of race, sex and national origin in failing to promote her. The district court granted summary judgment to the defendant. On appeal, the Ninth Circuit Court of Appeals noted that a prima facie case of unlawful employment discrimination on the basis of protected characteristics may be established through indirect evidence under *McDonnell Douglas Corp*. The court stated that even the school's favorable treatment of other Asian women would not necessarily defeat the plaintiff's claim at trial or on summary judgment, since such evidence creates a genuine dispute as to a material factual question.

The court held that the district court erred in separately treating the claims of racial and sex discrimination, noting that where two bases for discrimination exist, they cannot be neatly reduced to distinct components. The court stated that rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experience. Citing *Jefferies*, the court held that when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it

discriminates against people of the same race or of the same sex. 50 F.3d at 1561-1562. Legal commentators have supported this principle. *See* K. Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics. 1989 *U.Chi. Legal F.* 139. As noted in *Connecticut v. Teal*, 457 U.S. 440, 455, 102 S. Ct., 2525, 2535, 73 L. Ed. 2d 130 (1982), "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."

In *Lam*, the court stated that like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women, so that as a consequence they may be targeted for discrimination even in the absence of discrimination against Asian men or white women. The court indicated in a footnote that the district court's approach reduced discrimination against Asian women to discrimination against Asian men plus discrimination against white women. The court stated that the inherent fallacy of this approach is obvious when one considers that discrimination against white men could be similarly analyzed, using the same models: Asian men plus white women. 40 F.3d at 1562, n.19.

In addition, because of its flawed analytical approach, the Seventh Circuit Court of Appeals again failed to consider the statements made by Andersen in the workplace from 1988 and which created the overall atmosphere of race and sex discrimination under which the petitioner was forced to work simply because she is a black female. The absence of discrimination against black men, white men or white

women is irrelevant to the issue here and should not have been considered by the Seventh Circuit Court of Appeals. The only issue that should have been addressed is whether the petitioner was discriminated against ***because of her race and her sex***. A consideration of the statements made by Andersen in the workplace from 1988 to 1995 was mandated in order to determine the pervasiveness of the discriminatory atmosphere under which the petitioner had to work every day.

In the case at bar, the magistrate judge, the district court and the Seventh Circuit Court of Appeals applied the same fallacious analytical model — it compared a black female to black men and white women. The Seventh Circuit Court of Appeals rejected the holdings in *Steiner*, *Jefferies*, *Phillips*, *Hicks*, and *Lam*, and improper held that because the petitioner could not specifically point to a similarly-situated white female who was treated differently from her, she could not establish a *prima facie* case of discrimination.

The only relevant question that should have been considered by the courts below is: Did the harassment happen to petitioner because she is a black female? Whether or not there was harassment of black men or white females is irrelevant for purposes of making out a *prima facie* case of race and sex discrimination here. Because the Seventh Circuit Court of Appeals based its decision on its perception that women and men were all treated the same by Andersen, therefore comparing his treatment of a black female with his treatment of black men and white women, its analysis was flawed and is in conflict with the decisions of other circuit courts of appeal. Accordingly, this petition should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE VICARIOUS LIABILITY OF AN EMPLOYER FOR A SUPERVISOR'S CREATION OF A HOSTILE WORK ENVIRONMENT

The opinion of the Seventh Circuit Court of Appeals conflicts with this Court's prior rulings with regard to the vicarious liability of an employer for the creation of a hostile work environment by a supervisor. In its opinion, the Seventh Circuit Court of Appeals stated that because petitioner's immediate supervisor "was not a workplace decision maker", his statements could not provide the basis for a determination of discrimination.

In *Burlington Industries v. Ellerth*, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 633, 655 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 662, 689 (1998), both brought under Title VII, this Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." In *Faragher*, the employees who sexually harassed a female lifeguard were immediate male supervisors responsible for making lifeguard's daily assignments and for supervising their work and the fitness training. In the case at bar, the employee who harassed petitioner was her immediate supervisor on the work line, who was responsible for her daily assignments and for supervising her work.

Because the Court of Appeals came to the erroneous conclusion that only the comments of a decision-making supervisor can form the basis for a determination of discrimination, it did not address the fact that the supervisor's comments were routinely uttered in the workplace and were not just made to his girlfriend outside the workplace. Concluding that the comments were not made in the workplace, the court was doubtful of their admissibility. But the evidence established that the supervisor routinely made the obnoxious comments ***at work*** as well as at home. Had it properly dealt with this issue, the court could only have come to the conclusion that even if petitioner herself did not hear the derogatory remarks, the remarks evidence the sexual/racial purpose behind the conduct and behavior of her supervisor, which is sufficient to support a Title VII claim.

The Court of Appeals noted that had the statements been made in the workplace, the thrust of the opinion could have been markedly different. By concluding that Andersen had not made the comments in the workplace, the court failed to properly deal with the impact of the statements on the workplace. In *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), this Court found that separate educational facilities for black and white children were inherently unequal and that the policy of separating the races was usually interpreted as denoting the inferiority of blacks.

In the case at bar, black women were routinely subjected to the same kind of demeaning conduct in the workplace solely because of one person's perception of black women as inferior and unequal. The noxious statements were made in the workplace to others and not to the black women

directly. The routine and ongoing statements had the purpose and effect of demeaning the black women *per se*. Does the undermining and demeaning of other employees because of race create a hostile work environment because of race? Even if they were not made directly to the petitioner, there can be no question that the comments expressed by Andersen in the workplace created an atmosphere of sexual and racial stigma on Line 374. Petitioner was forced to work in a pervasive atmosphere of general hostility. Is it really necessary to be called a "stupid nigger bitch" to one's face in order to be discriminated against in the workplace?

The Court of Appeals indicated that the continuing violation doctrine is inapplicable here, excluding evidence of the conduct of Andersen that occurred before the 300-day limitations period. But there can be no doubt that the facts established that petitioner felt harassed on the line as early as 1988 and that the harassment continued through 1995. The Court of Appeals held that petitioner could not reach back and rely on evidence of incidents occurring prior to the 300 days before she filed her ERD complaint. This eliminated much of the most damning evidence against Andersen for purposes of petitioner's Title VII claim — the evidence in Ms. Brandon's affidavit that she routinely heard Andersen refer to the black women on Line 374 as "stupid black bitches", "stupid nigger bitches" and "fucking black bitches", and that when a machine broke down, she heard Andersen refer directly to petitioner as a "stupid black bitch". Ms. Brandon routinely heard such comments from July 1991 until she ended her relationship with Andersen in 1994. Although many of these comments were made in the workplace, the extent of it was latent and it was only through discovery after the complaint was filed that it became fully known to petitioner.

The Court of Appeals relied on the "continuing violation doctrine" to exclude this evidence of discriminatory treatment, basing its decision on its holding in *Galloway v. General Motors Service Part Operation*, 78 F.3d 1164, 1167 (7th Cir. 1996), that a victim of actual harassment "cannot reach back and base her suit on conduct that occurred outside the statute of limitations." *See also Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997). But the 300-day limitation period is not a statutory approach; it is a judicial creation. In a situation such as the one at bar, it becomes a limitation that is arbitrary and rigid and frustrates the public policy and purposes of Title VII, which is to eliminate all vestiges of unlawful discrimination in the workplace.

The Court of Appeals held that petitioner could reach back for the 42 U.S.C. § 1981 claims. The central issue is that the policy of eliminating evidence beyond the 300 day period even though that evidence is probative on the issues involved does not afford the petitioner a trial on the merits, since the most damaging evidence, and the evidence that established the general atmosphere of harassment pervading the workplace, was eliminated.

The use of the continuing violation doctrine to preclude the admissibility of this evidence, which was not discovered until after the complaint was filed and discovery was completed, also frustrates Fed. R. Ev. 402, which provides for the admission of all relevant evidence and Fed. R. Ev. 403, which provides for the admission of evidence if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence. The evidence presented in Ms. Brandon's affidavit is probative on the issue of the hostility that pervaded the petitioner's work environment and on the issue of the racial motivation of Andersen's conduct. Clearly, the inflexibility of the Seventh Circuit Court of Appeals in applying the continuing violation doctrine represents an artificial, arbitrary and capricious delineation which frustrates the entire public purpose and policy of Title VII, especially since many of the manifestations and flowering of discrimination do not blossom fully at the time the discrimination occurs.

As was noted by the Ninth Circuit Court of Appeals in questioning whether a requirement exists that a discrete discriminatory act occur within the relevant period of limitations in all cases arising under the continuing violation theory in *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108, n.1 (9th Cir. 1998), "we reserve decision as to whether requiring such a showing is appropriate in the context of a hostile work environment claim, ***given that a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations***." [Emphasis added]

Analyzing The Hostile Work Environment Claim

All the courts below determined that the petitioner was not subjected to a hostile work environment. The essence of a hostile work environment claim is that it is the ***work environment*** that is hostile. Therefore, evidence of a general work atmosphere is an important factor in evaluating a hostile work environment claim. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987). In *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in part, rev'd. in part*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), the D.C. Court of Appeals held that no evidence of sexual

harassment directed specifically toward the plaintiff was necessary for a claim under Title VII, stating "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive." In *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972), the same result was obtained in a Title VII racial discrimination case. In the case at bar, the obnoxious and derogatory comments made by Andersen about petitioner were not always made to her directly. But the general hostility fostered by the uttering of these comments in the workplace resulted in a pervasive atmosphere of harassment in which she was forced to work.

The complained of conduct need not be explicitly sexual or racial; it is sufficient if the harassment is discriminatory in ***character or purpose***. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989). In determining whether the employer's conduct is discriminatorily motivated, the court should consider the racial mix of the employer's work force. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). In *Oncale v. Sundowner Off Shore Services*, 523 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 201 (1998), a case of same-sex harassment, this Court set forth the analysis to be used in a Title VII claim of discrimination "because of . . . sex."

The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The corollary here is that members of one race should not be exposed to disadvantageous terms or conditions of employment to which members of the other

race are not exposed. This Court in *Oncale* stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex". This Court indicated that a trier of fact may reasonably find discrimination where the victim is harassed in such sex-specific and derogatory terms to make it clear that the harasser is motivated by general hostility to the presence of that sex in the workplace. This Court went on to indicate that direct comparative evidence may be offered as to how the alleged harasser treated members of both sexes in a mixed-sex workplace, but that whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely "tinged with offensive sexual connotations", but actually constituted discrimination because of sex. 140 L. Ed. 2d at 207-208.

The Court of Appeals here also questioned the applicability of 42 U.S.C. 1981, but § 1981 provides additional protection from discrimination based on race and it follows the same analytical model as Title VII. Whether or not evidence of conduct occurring prior to the 300 day period is admissible for section 1981 purposes, the petitioner was entitled to an evaluation of her claim based on evidence of conduct occurring six years from the date of filing of the complaint in federal court. Therefore, all evidence of Andersen's conduct from six years prior to the date of filing the complaint should be considered.

Andersen's conduct was abusive and clearly adversely affected a term or condition of petitioner's employment. The Court of Appeals failed to consider the general work atmosphere with its pervasive sexual and racial harassment because of its conclusion that because Andersen was not a workplace decision maker his comments made in the

workplace could not form the basis for a discrimination claim. This conclusion is in direct conflict with this Court's rulings in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. Had the court considered the conduct of Andersen in making racial and sexual comments in the presence of a racially and sexually mixed work force, it would have easily come to the conclusion that the character and purpose of Andersen's conduct was sexual and racial.

What the Court of Appeals did was to hold that Andersen's conduct, although implicit, did not have the "tinge of any sexual connotations." But this is irrelevant since the issue is whether the conduct had a racial character or purpose. The non-verbal harassment conduct of slamming the door in her face, cutting her car off in the parking lot and startling her with an electric cart, clearly do not have racial or gender overtones. A jury could reasonably find that the non-verbal harassment conduct of Andersen had a racial purpose and was intended to achieve a racial objective.

The harassing conduct in *Faragher* occurred intermittently over a five-year period. The comparable conduct here occurred over a six-year period. The harassing conduct exhibited by Andersen need not be explicit to have a racial purpose. The scope of conduct prohibited by Title VII is not limited to economic or intangible discrimination. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). In *Burlington Industries, supra*, this Court reiterated that the principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms and conditions of employment and explained that the latter must be severe or pervasive. Andersen's conduct

amounted to the fulfillment of threats similar to those in *Burlington*, and the conduct was done solely because of the plaintiff's race and sex. This constitutes discrimination based on sex and race in violation of Title VII and § 1981. Accordingly, it is submitted that the petition should be granted.

CONCLUSION

Because the decision by the Seventh Circuit Court of Appeals conflicts with prior rulings of this Court and with decisions of other courts of appeal on important issues of sexual and racial harassment in the workplace, the petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

WILLIE J. NUNNERY, ESQ.
Attorney for Petitioner
802 West Broadway
Suite 211
Bank One Building
Madison, WI 53713
(608) 224-1900